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Supreme Court of the United States

October Term, 1950

No. 279

PEOPLE *ex rel.* JOHN K. MOFFETT,
Petitioner,

v.

SPENCER E. BATES, HARRY E. CLINTON and ALLEN J. GOODRICH, constituting the State Tax Commission of the State of New York,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX.

PAGE

Statement 1

Statutory Provisions 2

The Questions Presented by the Petition..... 3

POINT I
The net income of unincorporated business is not immune from the taxing power of the State..... 5

POINT II
Failure to extend the tax to some professional services which may also be furnished by corporations neither invalidates the tax nor poses an objection available to petitioner 8

POINT III
There is no denial of due process on the ground of vagueness in the professional exemption provision of the Statute 10

Conclusion 12

CASES CITED.

PAGE

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 347 9

Carmichael v. Southern Coal Co., 301 U. S. 495, 508, 512 .....6, 7, 10

Central Greyhound Lines v. Mealey, 334 U. S. 653..... 4

Compania De Tabacos v. Collector, 275 U. S. 87, 100... 6

Connally v. General Const. Co., 269 U. S. 385..... 11

Flint v Stone Tracy Co., 220 U. S. 107..... 7

Hendrick v Maryland, 235 U. S. 610, 621..... 9

Hurley v Commission of Fisheries, 257 U. S. 223..... 3

International Harvester Co. v. Kentucky, 234 U. S. 216 11

Madden v. Kentucky, 309 U. S. 83..... 8

Matter of Geiffert v. Mealey, 293 N. Y. 583..... 9, 10

Matter of Hewitt v. Bates, 297 N. Y. 239..... 9

PAGE

Matter of Sidenberg v. Chapman, 273 App. Div. 566, affd. 298 N. Y. 730 2
Matter of Teague v. Graves, 261 App. Div. 652, affd. 287 N. Y. 549 ..... 9, 10
Murdock v. Pennsylvania, 319 U. S. 105 6
New York *ex rel.* Cohn v. Graves, 300 U. S. 308, 313 6
Noble State Bank v. Haskell, 219 U. S. 104, 112 12
Oliver Iron Co. v. Lord, 262 U. S. 172 6
Peo. *ex rel.* Metropolitan St. Ry. v. Tax Comm., 174 N. Y. 417 11
Peo *ex. rel.* Tower v. State Tax Comm., 282 N. Y. 407 .. 11
Quaker City Cab Co. v. Pennsylvania, 277 U S 389 7
Rapid Transit Corp. v. New York, 303 U. S. 573 7
Society for Savings v. Coite, 6 Wall. 594 5
Southwestern Oil Co. v. Texas, 217 U. S. 114 ..... 4, 6
United States v. Petrillo, 332 U. S. 1 11
Warehouse Company v. Tobacco Growers, 276 U. S. 71, 88 9

STATUTES.

Judicial Code, Sec. 1257(2) 2
" 1257(3) 2

New York Tax Law—
Article 9 3
" 9-A 3
" 9-B 3
" 9-C 3
" 16-A 1, 5

Section 386 2
" 386-a 2
" 386-e 2
" 386-k 2

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Statement

The review sought by petitioner herein is of a final order and judgment of the New York Court of Appeals (R. 56) unanimously affirming an order of the Appellate Division of the Supreme Court, Third Judicial Department, likewise unanimous (R. 50), which confirmed assessment against him of the unincorporated business tax imposed by Article 16-A of the New York Tax Law by the respondents comprising the State Tax Commission (R. 46).

Although the highest court of New York has sustained the validity of the statute itself against petitioner's claim that, as construed and applied, it violates the United States

Constitution, he has not invoked this Court's jurisdiction on appeal under Section 1257(2) of the Judicial Code but rather has prayed for discretionary review by writ of certiorari under paragraph (3) of that section. It is respondents' position that no federal question of substance is presented by the statute or the record warranting review by either method. It is submitted that the federal questions specified by petitioner are derived, in part at least, from fallacious premises as to the nature and operation of the tax statute and that in any event the act is well within principles firmly settled by this court affecting the scope of State taxing power.

Statutory Provisions

The petition, at pages 3 and 4, quotes in full the language of Tax Law, Sections 386 and 386-a, generally defining and imposing the New York tax in issue. We point out here that the tax is at rates not claimed to be confiscatory and is plainly a revenue measure, the proceeds of which are paid into the general funds of the State (§386-k). We would further emphasize that the tax is not a license tax imposing any condition precedent to engage in business. It is a tax upon the net income of all those individuals and unincorporated associations conducting or engaged in carrying on trade or business. Compensation as an employee is specifically excluded under Section 386. The tax is payable whether or not the proprietors of the business render personal service in the conduct thereof. *(Matter of Sidenberg* v. *Chapman*, 273 App. Div. 566, affd. 298 N. Y. 730). If they do, a deduction is allowed on account thereof in computing net income under the following provision contained in Section 386-e:

> "There may also be deducted on account of the personal service of an individual or member of a partnership carrying on an unincorporated business, if such

person be actively engaged in the conduct thereof, a reasonable amount on account of his personal services to be determined and allowed by the tax commission, except that in no event shall the aggregate of such deductions exceed twenty per centum of the net income of the unincorporated business (computed without the benefit of this deduction) but in no case exceed five thousand dollars per such individual or member."

Corporations engaged in business are taxed under the New York Tax Law pursuant to Articles 9, 9-A, 9-B and 9-C thereof at rates which give rise to no claim of discrimination on that score in this case.

The Questions Presented by the Petition

The petitioner "has consistently taken the position" (Brief, p. 5) that he is entitled to exemption from the tax pursuant to the statute on the ground that his individual business of consulting on matters of corporate financing and reorganization constitutes the practice of a profession. The courts of New York have held that the statutory exemption does not apply to his vocation and have overruled his contentions that, if construed to apply to him, the statute violates the Fourteenth Amendment.

The first question framed by petitioner is broad enough to assail the basic validity of the tax as one imposed upon "the right to work" or occupations engaged in as a matter of common right.

The second two questions concern the validity of the statute with particular reference to the exemption of those practicing professions of which petitioner claimed the benefit in the State courts. This might be thought to bring him within the rule that one may not both rely upon and assail a statute *(Hurley* v. *Commission of Fisheries,* 257 U. S. 223). The first issue in this respect grounds upon

the claim that some corporations are taxed although the same services rendered personally by an individual would be exempt as constituting practice of some of the lesser professions not forbidden to corporations. Since petitioner is not a corporation so taxed this is hardly a grievance open to him even if it otherwise had merit.

The third question raises the issue of whether the use of the word "profession" in granting the statutory exemption is so vague as to deny due process. The long-recognized distinction between the practice of professions and engaging in trade or business furnishes, we submit, a rational and definitive bases upon which the New York courts have consistently applied the exemption in accordance with the valid provisions and purposes of the statute. We mention here that even if any objection were found to inhere in the exemption it would not necessarily relieve petitioner of the burden of the tax by impairing it in its entirety rather than the exemption, and at most would warrant remission to the State courts for the purpose of determining severability of the invalid portion *(Southwestern Oil Co.* v. *Texas,* 217 U. S. 114; *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653.)

The issues now urged upon this Court are much curtailed from the scope of the arguments made below. While we question that petitioner's position is such that he may properly urge all of them, we do not rest upon that ground. We meet the issues, in the form and to the extent they are now presented, on the merits, and submit that they are wholly without sustance.

POINT I

The net income of unincorporated business is not immune from the taxing power of the State.

The main premise of petitioner's basic objection to Article 16-A of the Tax Law is that it imposes a "discriminatory" tax on the "right to work" which is a personal, constitutional right and, therefore, he asserts, immune. The premise is not supported by the nature of the tax as revealed by the plain terms of the statute or as characterized by the State courts. The tax is upon "income derived from carrying on business" (R. 53) and falls upon such net income whether or not the proprietor himself performs personal services. It is upon proprietary income from all business uniformly except corporate business otherwise taxed. Employees are not within its application and the value of the proprietor's personal services is a deductible item in computing net income, as we have shown.

Even if the premises were more in accord with the nature of the tax, the conclusion to which petitioner leaps is wholly contrary to long-settled principles. A large measure of public revenue has traditionally been derived from assessments upon the ownership of private property protected by constitutional guaranties.

The power of taxation is coextensive with sovereignty and reaches among other things "all trades and avocations by which the citizen acquires a livelihood" within the jurisdiction of the taxing authority *(Society for Savings* v. *Coite,* 6 Wall. 594). To say that an occupation is pursued as a matter of right is not to say that it receives no benefit or protection for which the public in its sovereign capacity may exact payment for the support of government.

> "Taxes are what we pay for civilized society, * * *. A penalty on the other hand is intended altogether to prevent the thing punished. It readily may be seen that a State may tax things that under the Constitution as interpreted it cannot prevent. The constitutional right asserted in *Allgeyer* v. *Louisiana* to earn one's livelihood by any lawful calling certainly is consistent, as we all know, with the calling being taxed." (Holmes, J., in *Compania De Tabacos* v. *Collector*, 275 U. S. 87, 100).

While this was said by Mr. Justice Holmes in dissent from the specific result of the case cited, the statement is referred to with approval by Mr. Justice Stone in *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 313, and expresses so basic a concept as to need no further comment (see also, *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 508).

The *Carmichael* case states that the sovereign power of taxation may be directed against "the exercise of personal rights and privileges". Uniformly imposed upon all business other than corporate, the statute does not go nearly so far as the extent of State power in classifying occupations and imposing taxes with respect thereto (*Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, *Oliver Iron Co.* v. *Lord*, 262 U. S. 172).

The citation of *Murdock* v. *Pennsylvania*, 319 U. S. 105, by petitioner is quite inapposite since this Court clearly stated that that case turned on "a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities". The Court carefully distinguished between "a tax on the income or property of a preacher" and an exaction for the "privilege of delivering a sermon". It was as "a condition of the exercise of" religious freedom that the exaction was invalidated (p. 112).

Likewise, the attempted distinction of *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, is made only by reversing this Court's approach to that issue. The tax there involved was first held to be a valid one as such and the Court then proceeded to determine objections based "on the devotion of the tax to purposes specified". It found that these were legitimate and, therefore, did not invalidate an otherwise proper tax. The general welfare purpose was not the validating factor in the tax.

The persistent reference to the tax as "discriminatory" is supported in petitioner's first point only by his statement that there is nothing to suggest that it is an exercise of the supervisory or police power of the State (Br., p. 11). With this we agree since the statute is professedly and actually a revenue measure. It is "therefore," he says, a discriminatory tax upon the exercise of a constitutionally protected right. The purport of this seems to be that the purpose of the statute to impose a tax on unincorporated business as a corollary to previously existing franchise taxes on corporate business works a discrimination against the former. This is a curious inversion of the usual argument that a tax is invalid because others claimed to be in the same class are not taxed. Of course corporations might be taxed while unincorporated business was not because of the advantages inherent in the privilege of corporate form *(Flint* v. *Stone Tracy Co.*, 220 U. S. 107). Indeed, special classes of corporations may be differently or additionally taxed (see *Rapid Transit Corp.* v. *New York*, 303 U. S. 573). It is a complete *non sequitur* to conclude that, because taxation of corporations could be upheld though no similar tax was imposed with respect to non-corporate business, the latter is immune from any taxation imposed on it as a class or that it is in any sense "discriminatory" to frame a tax system so that no business is left free from tax (see *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389).

The classification here made by the Tax Law describes with absolute equality a well-defined subject. It imposes the tax upon those who carry on business, as distinguished from those who do not. That distinction is neither narrow nor capricious. It omits, within that class, only corporate business already taxed. No conceivable basis exists for contending that the tax is not extended to all who come within its selected subject. It bears upon all business. The clear cleavage between those who carry on business and those not so engaged is ample warrant for confining the tax to the former and places it on a broader base than might have been picked out within the power to classify different kinds of businesses for tax purposes. The particular protection and benefits derived from the existence or organized government by those who freely exercise their right to engage in business make just and reasonable the tax in question, and appellant does not appear to argue that businessmen are not the beneficiaries of such protection. Even the suggestion of "hostile and oppressive discrimination" is unsupported. Altogether absent is the "explicit demonstration" required to overcome the presumption of validity *(Madden* v. *Kentucky,* 309 U. S. 83).

POINT II

Failure to extend the tax to some professional services which may also be furnished by corporations neither invalidates the tax nor poses an objection available to petitioner.

The second issue urged by petitioner turns on his contention that the tax is discriminatory because a few pursuits held to be professional so as to qualify for exemption from the unincorporated business tax involve services which taxed corporations are not forbidden to render. Were this argument otherwise meritorious no one could

possibly be aggrieved but a corporation so taxed. Petitioner is not incorporated and has, moreover, individually sought the exemption which he assails. It has been denied to him in this proceeding because his pretensions do not measure up to the requirements implicit in the word "profession." The objection under consideration is hardly available to him (*Hendrick* v. *Maryland*, 235 U. S. 610, 621; *Warehouse Company* v. *Tobacco Growers*, 276 U. S. 71, 88; and see *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347).

The objection is equally unavailable on the merits. Again the premise cannot be stated as broadly as petitioner would have it. In adjudicating claims for professional exemption the Court of Appeals has recognized those of industrial designers and landscape architects (*Matter of Teague* v. *Graves*, 261 App. Div. 652, affd. 287 N. Y. 549; *Matter of Geiffert* v. *Mealey*, 293 N. Y. 583). Concededly, corporations are not prohibited from rendering the services of those professions through qualified officers and employees. However, as to professions other than law, medicine, dentistry and architecture "which under existing law cannot be conducted under corporate structure" the exemption applies only if more than eighty per cent of the income is derived from personal services actually rendered by the individual or partners, and capital is not a material income-producing factor. This includes all those professional services which could be purveyed by corporations, such as teaching, etc. (*Matter of Hewitt* v. *Bates*, 297 N. Y. 239).

An individual receiving proprietary net income is exempt only if derived from his personal practice of those lesser professions which might be engaged in under corporate form. But corporations may do so only through officers and employees. The corporate entity cannot be a qualified professional person and is itself a business organization.

The distinction between business and profession is sufficient to warrant not extending a business tax to professionals personally practicing in their own behalf. The burden of the tax is on those engaged in business. In achieving symmetry in this respect, it does not, in one small area, match corporate taxation. Such inconsistent precision is not required where there is plain basis for the exemption (*Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 512).

As illustrating the claimed discrimination, petitioner points to the exemption of *Geiffert* and *Teague* while he himself was taxed. Any persuasion in that argument must obviously depend on the merits of his claim to be practicing a profession. He makes so slim a showing in this regard that it seems scarcely necessary to labor the basis of differentiation. *Geiffert* and *Teague* were found to be practicing arts which achieved a synthesis of the professions of architecture and engineering with creative artistry and had received higher academic recognition. Petitioner's skill and experience in matters of corporate finance and reorganization, making his services as consultant valuable, are of the essence of business and plainly not a separate art or science of professional caliber.

POINT III

There is no denial of due process on the ground of vagueness in the professional exemption provision of the statute.

Although petitioner claims that the exemption of the statute with respect to professions is so vague as to be unintelligible and thus to deny due process, he has not been deterred from making vigorous argument that his occupation meets the defined standard of professional dignity. He has been denied exemption because his pretensions fell

short of the requirements implicit in the statutory language as applied by the New York courts *(Peo. ex rel. Tower* v. *State Tax Commission,* 282 N. Y. 407).

Connally v. *General Const. Co.,* 269 U. S. 385, is the authority cited by petitioner under this head. The principle there set forth has been applied mainly, if not entirely, to statutes imposing penalties. It governs only those cases where it is impossible to ascertain which of possible constructions is intended by the legislature.

Petitioner here is not risking preventive penalties or other penal consequences. He has been subjected only to revenue taxation. Moreover, the *Connally* principle has no application even in criminal cases merely because of the difficulty of determining the side of the line upon which to place marginal cases on their facts *(United States* v. *Petrillo,* 332 U. S. 1). The concept of "profession" has a technical and special significance of long standing clearly justifying its use in prescribing a tax exemption. No one could argue that there is not a zone of professional pursuits into which many vocations, such as those of the doctor or the lawyer, fit with certainty, or that there is an equally certain classification of business pursuits such as storekeeping, manufacturing and the like. Under no circumstances can an exemption from taxation, to be strictly contrued under New York law *(Peo. ex rel. Metropolitan St. Ry,* v. *Tax Comm.,* 174 N. Y. 417), be called an "illusory form of words" because granted in the case of personal practice of any "profession" *(International Harvester Co.* v. *Kentucky,* 234 U. S. 216).

Petitioner's main argument derives from the fact that the New York Court of Appeals has twice disagreed with the Tax Commission in particular cases, and in one of these it reversed the Appellate Division. These are the only such instances he could find in the fourteen instances

in which the courts have decided claims for exemption, including this case. Both of these were cases where the professions involved had but recently attained that dignity and where the sole question was whether the facts came within settled principles. Such distinctions are of the kind that courts are daily called upon to draw. If occasional division among them were to postulate unconstitutional uncertainty in statutes under construction, the fabric of written law would be torn asunder. The line of demarcation is traditionally "pricked out by the gradual approach and contact of decision on the opposing sides" *(Noble State Bank* v. *Haskell,* 219 U. S. 104, 112).

CONCLUSION

Petitioner's application for certiorari should be, in all respects, denied.

September 27, 1950.

Respectfully submitted,

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